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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DAVID N. and JULIE A.
SPARKS.

DAVID N. SPARKS,

Appellant,

v.

JULIE A. SPARKS,

Respondent.

G052502

(Super. Ct. No. 10D000577)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Carla A. Singer, Judge. Affirmed.

The Southwick Law Firm and Stanley K. Southwick for Appellant.

No appearance for Respondent.

* * *

INTRODUCTION

The trial court ordered David N. Sparks to pay a portion of the attorney fees incurred by his ex-wife, Julie A. Sparks, in litigating postjudgment matters.¹ The court's attorney fees award was based both on Julie's financial need, and on David's vexing conduct, pursuant to Family Code sections 2032 and 271, respectively. (All further statutory citations are to the Family Code.) David challenges the attorney fees award on appeal. We conclude the trial court did not err in making the award on either ground set forth in the court's order; therefore, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Judgment terminating the parties' marital status was entered in December 2010. Judgment on the reserved issues of child custody and visitation, child support, spousal support, and property and debt division was entered in May 2011. The parties filed numerous postjudgment motions for modifications of support, custody, a move-away order, and adjudication of omitted property.

The trial court ordered David to pay \$24,300 of Julie's attorney fees on the basis of need: "[Julie] earned substantially less money than [David]. Because of the numerous filings by [David], [Julie] needed to be represented by counsel."

The court also concluded that fees and costs should be awarded as a sanction against David based on David's conduct, the relative circumstances of the parties, and David's bad faith actions or tactics. "[David] is litigious. [David] rarely prevailed,^[2] but [Julie] was placed in a position of having to defend every time [David]

¹ We refer to the parties by their first names to avoid confusion; we intend no disrespect.

² While the statement of decision states that Petitioner, Julie, rarely prevailed, the court's minute order and the reporter's transcript state that it was David who rarely prevailed.

filed a Request for Order or Order to Show Cause. The Court finds that some of [David]'s filings were futile.”

“The Court determines that there is a need for an award to [Julie] so that each party has sufficient financial resources to adequately present his or her case. [David] can afford to reimburse [Julie] for her attorney’s fees, and [David] exacerbated the difficulty of resolving the issues. [¶] [Julie] was credible with respect to her current hardships even though she has remarried. She is employed at an extraordinarily low level as a waitress, and would enjoy returning to employment as a teacher if she could.”

“The Court was not persuaded that [David] would have provided tax returns if they were requested. [Julie] wisely elected not to proceed with discovery, as [David] would not provide reliable information whether [*sic*] requested, and which would have necessitated more litigation to compel. The fact that [Julie] had to go to extreme lengths to get the little documentation she did secure to support her position would suggest that [David] is in fact hiding income. The Court finds [Julie]’s calculations regarding [David]’s income based on work records more reliable than [David]’s testimony. The court did not find reliable [David]’s claims regarding his lack of income, high debt and financial devastation, due to [David]’s lifestyle and having an occupation and skills that pay him well.”

The trial court found that Julie’s fees and costs were \$46,500, of which \$10,000 was attributable to her move-away request and therefore her own responsibility. Because David earned two to three times more than Julie, the court ordered him to pay two-thirds of the balance of Julie’s fees and costs, or \$24,300.

DISCUSSION

I.

NEED-BASED ATTORNEY FEES AWARD, SECTION 2032

We review an award of need-based attorney fees under sections 2030 and 2032 for abuse of discretion. (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829.) We must affirm unless no judge could reasonably make the order. (*Ibid.*) We indulge all reasonable inferences to uphold the court's order. (*In re Marriage of Abrams* (2003) 105 Cal.App.4th 979, 991.)

In awarding need-based attorney fees under sections 2030 and 2032, the record must reflect the trial court's exercise of its discretion, as well as its consideration of the relevant statutory factors in the exercise of that discretion. (*In re Marriage of Lynn* (2002) 101 Cal.App.4th 120, 133-134; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 315; *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866.)

David argues on appeal that the trial court erred by failing to make findings that Julie did not have sufficient financial resources to present her case adequately, or that David had the financial ability to pay for a portion of Julie's attorney fees while continuing to pay for his own legal representation.

Among the trial court's findings on the parties' respective abilities to pay for legal representation are the following:

“[Julie] earned substantially less money than [David]. Because of the numerous filings by [David], [Julie] needed to be represented by counsel.”

“The Court determines that there is a need for an award to [Julie] so that each party has sufficient financial resources to adequately present his or her case. [David] can afford to reimburse [Julie] for her attorney's fees, and [David] exacerbated the difficulty of resolving the issues. [¶] [Julie] was credible with respect to her current hardships even though she has remarried. She is employed at an extraordinarily low level as a waitress, and would enjoy returning to employment as a teacher if she could.”

“The Court finds [Julie]’s calculations regarding [David]’s income based on work records more reliable than [David]’s testimony. The court did not find reliable [David]’s claims regarding his lack of income, high debt and financial devastation, due to [David]’s lifestyle and having an occupation and skills that pay him well.”

The trial court’s findings were supported by the evidence presented to the court at the evidentiary hearing on attorney fees.

David argues that the trial court erred by failing to set a “reasonable payment schedule” for him to pay the attorney fee award. Although the court refused David’s counsel’s request for a payment schedule, it explained why it was doing so: “I’m hoping that with this decision there will be some finality to the litigation between these two people to what appears to me to be a waste of money that could be better spent saving for [their] child’s college education. [¶] I’m hoping that at some point these parties who, you said in your argument, don’t like each other and never have, will find a way to work together for the betterment of the common good. The betterment of the common good, as far as I’m concerned, being the child of this marriage. [¶] Also, the common good would be, it seems to me, what’s in the best interests of the parties. And if [David] doesn’t want an order that compels him to pay this reimbursement by a specific date, then I think that he has the power to open the door to a payment plan. I think that [Julie’s attorney] would be receptive to it, but both parties would have to agree. Absent such an agreement, the court will not make an order, so there you have it.”

The court specifically found that Julie’s counsel’s hourly rate was reasonable. The court did not make a finding as to the reasonableness of the hours spent, although the court did find that the quality of the service provided was high. David did not bring to the trial court’s attention the failure to make a finding of reasonableness of hours spent of services provided, and has therefore waived the right to challenge the court’s order on that basis. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

The trial court did not err in ordering David to pay Julie's attorney fees pursuant to section 2032.

II.

ATTORNEY FEES AS A SANCTION, SECTION 271

“We review an award of attorney fees and costs under section 271 for abuse of discretion. [Citation.] ‘Accordingly, we will overturn such an order only if, considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order. [Citations.]’” (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 291; see *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 122 [the trial court has broad discretionary authority under section 271].) ““We review any findings of fact that formed the basis for the award of sanctions under a substantial evidence standard of review.”” (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 995.)

David argues that the sanctions award must be reversed because the trial court did not make a finding that he had engaged in conduct that frustrated settlement of the case. It is true that the trial court's statement of decision does not specifically reference acts directly frustrating settlement.³ However, the cases interpreting section 271 make clear that the indirect frustration of settlement by any means may be sanctioned under section 271. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1320 [court abused its discretion in failing to award sanctions where sanctioned spouse “frustrated and blocked discovery, without good cause”]; *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1479-1480 [award of sanctions for failing to disclose all assets advances policy “of promoting settlement of litigation and encouraging cooperation of

³ The court's minute order, however, includes the following: “Court finds that [David] was litigious and has not attempted to settle issues with [Julie].”

the litigants”]; *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 399-403 [wife sanctioned for filing a claim of intentional infliction of emotional distress].)

Relative to the order of sanctions, the trial court in this case made the following findings of fact in its statement of decision: (1) David “voluntarily absented himself from a prearranged, prescheduled hearing involving numerous issues”; (2) Julie was required to obtain legal representation due to David’s “numerous filings”; (3) David is litigious, but rarely prevailed, and some of his filings were futile; (4) David “exacerbated the difficulty of resolving the issues”; and (5) David’s past conduct in concealing financial information relieved Julie of the need to pursue discovery and discovery motions. The trial court’s sanctions award was amply supported by findings that David frustrated settlement and created more litigation by his conduct.

David also argues that the trial court failed to determine his ability to pay Julie’s attorney fees, as required by section 270: “If a court orders a party to pay attorney’s fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the ability to pay.” David is incorrect. David testified in November 2014 that being required to pay for all or a portion of Julie’s attorney fees, he would not be able to pay his bills, would not be able to see his son, and would lose his house. The court found David to be not credible in terms of his testimony regarding his financial status.

The trial court made the following findings relative to David’s ability to pay: (1) “[David] can afford to reimburse [Julie] for her attorney’s fees”; (2) “[t]he Court finds [Julie]’s calculations regarding [David]’s income based on work records more reliable than [David]’s testimony. The court did not find reliable [David]’s claims regarding his lack of income, high debt and financial devastation, due to [David]’s lifestyle and having an occupation and skills that pay him well”; and (3) “[t]he Court finds that [David] has always earned, at the very least, two to three times as much as [Julie].” The trial court’s assessments of the parties’ credibility are binding and

conclusive on this court. (*In re Marriage of Hill & Dittmer* (2011) 202 Cal.App.4th 1046, 1052.)

David argues that he was not provided sufficient notice, pursuant to section 271, subdivision (b), which provides: “An award of attorney’s fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.” When the trial court “sanctions a party in a family law matter and orders that party to pay the other side’s attorney fees and costs, the court must provide notice and an opportunity to be heard and take into consideration the party’s ability to pay. [Citation.]” (*In re Marriage of Laurenti* (2007) 154 Cal.App.4th 395, 404, fn. 11.)

Neither the statute nor the reported cases specify how much notice is required. In *Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1175, the wife requested attorney fees pursuant to section 271 in her opposition to the contempt proceedings initiated by the husband. In the tentative decision finding there was insufficient evidence of the wife’s contempt, the court sanctioned the husband in the amount of \$87,000, and noted: “[t]he proposed award with respect to the attorneys fees in favor of [the wife] will serve as notice . . . of the court’s intent to impose fees as a sanction pursuant to [section] 271. If [the husband] wishes to have an evidentiary hearing on any issue regarding the proposed sanction he shall make such a request at the same time he files . . . his objections or proposals’ to the tentative decision.” (*Id.* at p. 1175.) The husband objected to the tentative decision, but no further evidentiary hearing was held. (*Ibid.*) Given these facts, the appellate court concluded the husband had sufficient notice under section 271. “Here, the court notified [the husband] it intended to impose sanctions under section 271. It also gave [the husband] a meaningful opportunity to be heard: the tentative decision advised him he could object to it and request a hearing on the proposed sanctions. Furthermore, the court notified [the husband] of the specific conduct giving rise to sanctions and the grounds upon which the sanctions would be based. The

imposition of sanctions under section 271 did not violate [the husband]’s due process rights. [Citation.]” (*Parker v. Harbert, supra*, 212 Cal.App.4th at p. 1179.)

David complains that the court set the evidentiary hearing on attorney fees with just one day’s notice, and set a second evidentiary hearing with just one week’s notice. What David fails to mention is that the issue of attorney fees was before the trial court for months, and like the substantive issues of visitation, support, and the move-away order, it had been continued numerous times over the course of many months.⁴ When it was finally set for a two-day hearing, David failed to appear on the second day (due to a work training commitment). The court then moved the hearing on attorney fees to the next day. In David’s absence, the court received testimony from Julie. The court then continued the hearing for one week to allow David the opportunity to appear and testify. Accordingly, David did not receive just a single day’s or a single week’s notice of the hearing.

The trial court did not err in ordering David to pay a portion of Julie’s attorney fees as a sanction under section 271.

⁴ A July 5, 2012 minute order reads, in relevant part: “Matter is continued . . . to September 19, 2012 . . . regarding finances which include attorney fees and costs.” The matter was continued to February 13, 2013, then to May 17, 2013, then to September 20, 2013, then to November 8, 2013, then to March 24, 2014, then to April 8, 2014, then to June 16, 2014, then to September 23, 2014, then to November 2014, when the hearing began. On November 13, 2014, Julie’s counsel advised the trial court there was an issue regarding attorney fees and costs, which the court indicated would be heard the next day. At the end of the hearing on November 14, the matter was trailed to November 20, after which the matter was continued to February 4, 2015, and then to March 3, 2015, at which time the court made its order on attorney fees.

DISPOSITION

The postjudgment order is affirmed. As respondent did not appear, no costs shall be awarded. (Cal. Rules of Court, rule 8.278(a)(5).)

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.